intended to comply with them, it was but an unexecuted intention, which has never been held of itself to constitute fraud." [8]

There are, however, on the contrary, a great number of cases which hold that a promise to perform an act in the future is a statement of fact. Perhaps the best known of these is that in which Bowen, L. J., said: "The state of a man's mind is as much a matter of fact as the state of his digestion." [9] In a comparatively recent case,[10] it was said that when one man makes a promise to another as an inducement for a change of position on the part of the latter, he, if not expressly, impliedly avers that he has an existing intent to fulfil his promise, and such implied averment of existing intent is a matter of fact, and, if false and fraudulent, is a fraudulent representation.

It would seem that the latter line of cases represent the better view. The difficulties encountered by adhering to the rule that a promise is not a statement of fact are well illustrated in the Illinois case,[11] where strict adherence to the rule worked great injustice, and in the Texas case, where, although a just result is reached, yet it is inconsistent with the rule that a false representation must be one of fact. On the other hand, treating a promise to perform some act in the future as a statement of intention, and treating intention as an existing fact, it follows that if, at the time the promise was made, there was an intention to perform, subsequent non-performance would not constitute fraud, while, on the other hand, if, at the time the promise was made, no such intention existed, there would be a false representation of a material fact, sufficient as a basis for giving the injured plaintiff relief, thus reaching a result sound in morals as well as in law.

THE EFFECT UPON THE LIABILITY OF A GUARANTOR OF A CHANGE IN THE PERSONNEL OF THE OBLIGEE OR OF THE PRINCIPAL DEBTOR.

It is a well settled rule of suretyship that the liability of a guarantor or surety cannot be extended by implication or otherwise—beyond the actual terms of his engagement. It does not matter if the proposed alteration would result in his benefit, for he has the right to stand upon the very terms of his agreement. In the language of Lord Ellenborough, "the

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[8] *Gage* v. *Lewis*, 68 Ill. 604.

[9] *Edginton* v. *Fitzmaurice*, 29 Ch. Div. 459.

[10] *Rogers, et al.*, v. *Virginia-Carolina Chemical Co.*, 149 Fed. Rep. 1.

[11] *Gage* v. *Lewis*, 68 Ill. 604.

claim against a surety is *strictissimi juris*." In accord, it is the general rule that a guaranty when addressed to a particular person can only be acted upon and enforced by such party.[1] A guaranty for goods to be sold to a firm has been held not to cover advances made to one member of the partnership.[2] If a guaranty is made to a partnership and one of the partners dies;[3] or if there is a change in the membership of the firm in any other way the guaranty will not cover any subsequent advances. "A, B, and C were partners in banking and their particular articles of partnership provided that if any one of the partners died the legal representative of such one might take his place in the business. D guaranteed all sums, not exceeding £2,000, which should afterwards become due to A, B, and C from E. A died and his representative became a member of the firm. *Held*: D was not liable for any advances made to E after the death of A."[4] The reason for the rule is that, "a man may very well agree to make good such advances, knowing that one of the partners, on whose prudence he relies, will not agree to advance money improvidently."[5] Similarly, if a letter of credit is directed to an individual, it will not support an action for advances made by a firm of which the individual addressed is a member or may subsequently become a member, for the writer cannot be held to have consented to advances made by the firm.[6]

All the above cases deal with the effect upon the liability of the guarantor of a change in the personnel of the obligee. The same results are found in the case where the personnel of the principal debtor is changed. The sureties on a bond conditioned that the principal shall pay for all purchases made by him from the obligee are not liable for purchases made from the obligee by a partnership of which the principal is or subsequently becomes a member.[7] In this case the Court said, "While they (the sureties) might be willing to be sureties for Delano, it does not follow that they can be bound or

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[1] *Taylor* v. *Wetmore*, 10 Ohio, 490; *Smith* v. *Montgomery*, 3 Tex. 199; *Sollee* v. *Mengee*, 1 Bailey Law (S. C.), 620.

[2] *Cremer* v. *Higginson*, 1 Mason, 323.

[3] *Pemberton* v. *Oakes*, 4 Russell, 154.

[4] *Hawkins* v. *N. O. Printing Co.*, 29 La. App. 134; *Holland* v. *Teed*, 7 Hare, 50.

[5] *Cosgrave Brewing Co.* v. *Starrs*, 5 Ont. (Canada) 189; *Spiers* v. *Houston*, 4 Bligh (9 N. R.), 515.

[6] *Sollee* v. *Mengee* (*supra*).

[7] *Parham Sewing Machine Co.* v. *Brock*, 113 Mass. 194.

have consented to be bound, for the acts of any one whom Delano may have taken into partnership." [8] A wrote to B as follows: "Any thing you can do for the bearer, Major S. M. Neil, whom I introduce as my friend, will be done for me, he being a merchant in Clinton. P. S. If you should accept for Mr. Neil for $1,000, I will be bound by this note." On the strength of this B guaranteed two drafts of Hartley and Neil. *Held:* A was not liable for such guaranty. A, "might have been willing to become surety for Neil, and not for Hartley and Neil. The engagement was personal as to Neil." [9]

Again, if a guaranty is made for goods advanced to an individual and they are advanced to the firm of which the individual named is a member, there is no liability. A gave B a guaranty for goods to be purchased by C to the extent of £200. C took D as a partner and B sold goods to C and D on the credit of the guaranty. *Held*: A not liable as surety.[10]

The further question that presents itself is whether or not you can introduce parol evidence to show that the face of the guaranty does not express the intent of the parties. In the case of *The Michigan State Bank* v. *Pecko,*[11] the guaranty commenced, "C. C. Trowbridge, Esq., President, Detroit, Michigan," and there was no further evidence of the party addressed. Money was advanced on the guaranty by the Michigan State Bank, of which Trowbridge was president. *Held,* It may be shown by parol that the guaranty was intended for the bank. The Court applied the common law rule governing simple contracts to the contract of guaranty, "which is that they may be sued upon either in the name of the nominal or the real party * * * and in the present case the letter being addressed to the person as president, and showing him to be president of the plaintiff bank and of no other institution, renders it certain that it was intended for the plaintiff's benefit." [12] In the case of *Smith* v. *Montgomery,*[13] a guaranty was on its face addressed to "Col. Smith and Pilgrim" but on its back it was addressed to Smith only. Smith

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[8] *White Sewing Machine Co.* v. *Hines,* 61 Mich. 423; *Ins. Co.* v. *Scott,* 81 Ky. 540, *accord.*

[9] *Bell* v. *Norwood,* 7 La. (4 Curry) 95.

[10] *Shaw* v. *Vandusen,* 5 Up. Cam. (Q. B.) 353; *Gas Co.* v. *Ely,* 39 Barb. 174.

[11] 28 Vt. 200.

[12] *Drummond* v. *Prestman,* 12 Wheat. 515; *Wadsworth* v. *Allen,* 8 Gratt. 174, *accord.*

[13] 3 Tex. 199.

alone sold the goods. *Held,* The guarantor is not liable. The face of the guaranty only could be considered and not the address on the back. As there was no ambiguity about the guaranty, parol evidence could not be received to vary it. In the recent case of *Lamm* v. *Colcord,*[14] the issue in the above cases came directly before the court. The guaranty read, "Lamm and Co., Chicago, Ill. Dear Sir: You can extend credit to O. C. Scoresby to the amount of $400 and I will stand good for the same. C. F. Colcord." Goods were advanced to Scoresby Tailoring Co. *Held,* Defendant is not liable in the absence of proof that O. C. Scoresby solely comprised the Scoresby Tailoring Co. This duty, the court said, is upon the plaintiff. Thus the court intimates that such evidence could be introduced and if it were shown that O. C. Scoresby and the Scoresby Tailoring Co. were one and the same person then an action would lie in the name of the latter.[12]

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[14] 98 Pac. 355 (Sup. Ct. of Okla., Nov. 12, 1908).